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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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The question presented by the government's petition in the instant case is whether police, acting with probable cause but without a warrant, properly searched a closed but unsealed paper bag found in the trunk of respondent's automobile during a lawful search of the vehicle. In opposition to the petition, respondent contends (Mem. in Opp. 3-6) that this Court's subsequent decision in *Robbins* v. *California*, No. 80-148 (July 1, 1981), which addressed the opening by police of a sealed opaque plastic wrapped package containing marijuana bricks during a vehicle search, makes review of this question unnecessary. In our view, however, the failure of the Court in *Robbins* to articulate the principles governing the search of such packages during lawful automobile searches in any fashion that commanded a majority of the Court leaves this important area of Fourth

Amendment law unsettled. The reasons for granting review in this case are, accordingly, even more substantial than they were prior to the decision in *Robbins*.

In *Robbins*, the plurality opinion authored by Justice Stewart, in which Justices Brennan, White, and Marshall joined, adopted an absolute standard governing searches of closed containers during lawful automobile searches, rejecting the argument that, for purposes of the Fourth Amendment warrant clause, there is a distinction between luggage and other traditional repositories for personal effects, on the one hand, and flimsier containers such as paper bags in which there is typically a less substantial privacy expectation, on the other. Slip op. 5. The plurality also concluded that, in the absence of some other recognized exception to the warrant requirement, "a [closed opaque] container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile" (*id.* at 8).

Two Justices concurred only in the judgment reversing Robbins' conviction. Justice Powell stated (*Robbins, supra*, slip op. 1) that he concurred in the judgment because the result was "justified, though not compelled, by the Court's opinion in *Arkansas* v. *Sanders*, 442 U.S. 756 (1979)," but that he could not join the plurality opinion because it went well beyond *Sanders* or any prior case. In particular, he rejected the plurality's sweeping requirement that law enforcement officers must procure a warrant prior to the search of any closed container, irrespective of circumstances which demonstrate the absence of any reasonable expectation of privacy respecting its contents (*Robbins, supra*, slip op. 5-6). In Justice Powell's view, which we share (but contrary to the decision of the court of appeals in the instant case), this Court's decisions in *Arkansas* v. *Sanders, supra*, and *United States* v. *Chadwick*, 433 U.S. 1 (1977), "require police to obtain a warrant to search the contents of a container only when the container is one that generally

serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny" (*id.* at 4). This formulation requires a determination whether the defendant's claim to privacy in a particular type of container "is reasonable in light of all the surrounding circumstances." *Id.* at 5, quoting *Rakas* v. *Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring). Noting that some packages, such as paper grocery bags, "consistently lack" indicia of an expectation of privacy, and that otherwise ambiguous containers may evidence the extent of their owner's privacy expectations by virtue of their size, shape, construction, or sealing, Justice Powell concluded in *Robbins* that, because of "the manner in which the package at issue was carefully wrapped and sealed," it fell within the protected category (slip op. 1, 6 n.3).

Justice Powell also questioned the plurality's conclusion that it was of no consequence that the sealed package was opened during the course of a lawful automobile search. He found substantial merit in the position of the three dissenters[1] that "when the police have probable cause to search an automobile, rather than only to search a particular container that is fortuitously located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein" (*Robbins, supra,* slip op. 7), and observed that adoption of such an approach would "provide ground for agreement by a majority of the presently fractured

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[1]In his dissent, Justice Blackmun adhered to his view, expressed in *Arkansas* v. *Sanders, supra,* 442 U.S. at 772 (Blackmun, J., dissenting), that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant. Slip op. 1-2 (Blackmun, J., dissenting). Both Justice Rehnquist (slip op. 5, 7) and Justice Stevens (slip op. 1-4) endorsed that analysis in their respective dissents, as well.

Court on an approach that would give more specific guidance to police and courts in this recurring situation * * *" (*ibid.*). Justice Powell declined, however, to undertake a reexamination in *Robbins* of broad language in *Sanders* deemed inconsistent with this application of the automobile search exception because the argument was not pressed by the parties and it was too "late in the Term * * * to undertake *sua sponte* reconsideration of basic doctrines" (*Robbins, supra,* slip op. 7). He concluded by observing that the Court has "an institutional responsibility * * * to make every reasonable effort to harmonize [its] views on constitutional questions of broad practical application," and that "the confusion that infects this benighted area of the law" could be resolved only in the context of a future case implicating the principles in question. *Id.* at 8 & n.4.[2]

Because the instant case involves the opening by police officers of an unsealed paper bag during the warrantless search of an automobile for heroin, it provides precisely the vehicle envisioned by Justice Powell for resolving the issues that divided the *Robbins* Court. In view of the importance for law enforcement of the issues involved—whether application of the warrant requirement depends upon the character of the container that is the object of the search, and whether, during a lawful, warrantless automobile search, the police may open containers found there—we renew our

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[2]The Chief Justice also concurred in the judgment but wrote no opinion setting forth his reasoning. But cf. *Arkansas* v. *Sanders, supra,* 442 U.S. at 766-768 (Burger, C.J., concurring), wherein the Chief Justice observed that the warrantless luggage searches in *Chadwick* and *Sanders* were not conducted in connection with automobile searches, and suggested that the rule regarding warrants for luggage searches might differ when the search was incidental to an automobile search.

submission that review should be granted to clarify the principles that govern this area of the Fourth Amendment law.[3]

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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[3]The absence of authoritative guidance left in the wake of *Robbins* has already been noted by at least one court of appeals. *Government of the Virgin Islands* v. *Rasool, Abiff Hiram*, No. 81-1267 (3d Cir. Aug. 19, 1981), slip op. 20-22; *id.* at 25-27 (Adams, J., concurring). Although deciding the case in reliance upon *New York* v. *Belton*, No. 80-328 (July 1, 1981), the Third Circuit squarely stated as well that, notwithstanding *Robbins*, it would have upheld the warrantless search of a paper bag found in an automobile on the ground expressed in Judge Tamm's dissent in the instant case--*i.e.*, that the container involved could not support an expectation of privacy sufficient to require a warrant. *Rasool, supra*, slip op. 22; see Pet. App. 28a-47a. Only further review of this question by this Court can eliminate the sharp division among the courts of appeals on the question presented in our petition.

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